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No. 85-1790

In the Supreme Court of the United States

OCTOBER TERM, 1985

COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board correctly found that the full-time faculty members employed by petitioner are not managerial personnel excluded from the coverage of the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 783 F.2d 29. The decision and order of the National Labor Relations Board (Pet. App. 10-31) is reported at 273 N.L.R.B. No. 214.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9) was entered on January 30, 1986. The petition for a writ of certiorari was filed on April 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a private, nonprofit institution of higher education consisting of three professional schools: art, engineering and architecture. It has approximately 1,000 students and employs about 60 full-time and 80 part-time faculty members. In 1978, the Cooper Union Federation of College Teachers, which had been certified as the bargaining representative of petitioner's full-time faculty members and librarians (Pet. App. 11), entered into a collective bargaining agreement with petitioner. In 1980, shortly before the agreement was to expire, petitioner informed the Union that it was withdrawing recognition (Pet. App. 3-4). Petitioner asserted that the faculty members were managerial personnel within the meaning of this Court's decision in *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), and were therefore excluded from the coverage of the National Labor Relations Act.

2. The National Labor Relations Board's administrative law judge concluded that the faculty members were managerial employees within the meaning of *Yeshiva* and dismissed a complaint charging petitioner with violating Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5). The Board disagreed, finding that the authority of the faculty "does not rise to the level of 'represent(ing) management interests by taking or recommending discretionary actions that effectively control or implement employer policy,' or 'formulat(ing) and effectuat(ing) management policies by expressing and making operative the decisions of their employer' within the meaning of *Yeshiva*" (Pet. App. 27). The Board explained that the faculty's authority in academic areas had been "made ineffective by the administration" in a "variety of ways," and that the "faculty lacks substantial input into nonacademic matters" as well (Pet. App. 26-27).

At the outset, the Board found that petitioner's charter vests ultimate authority for management and control of the institution in a Board of Trustees. No faculty representatives are on the Board. General supervisory powers over the day-to-day operations of the school are vested in the president, who is responsible for the appointment and removal of administrators, faculty and staff, and for the determination of their duties. General supervisory authority over academic affairs and officers is vested in a provost. Pet. App. 11.

The Board found that petitioner's faculty's role in institutional decision-making is formally defined in a faculty manual and in each separate school's set of "governances." Pursuant to these governances, the faculty members of each of the three schools meet as a deliberative body. The dean of each school serves as the permanent chairperson and exercises the responsibility "for calling and presiding over faculty meetings, preparing the agenda, and communicating faculty actions to the president." Pet. App. 11-12. The governances further provide that the faculty is to carry out its duties through members' participation in certain standing committees—including administrative, admissions, academic standards, curriculum, calendar and schedules (Pet. App. 12). Two joint standing committees—student activities and academic freedom and tenure—have also been established on an institution-wide basis.

The Board found, however, that the structure established by the governances did not give the faculty substantial authority. The Board noted "that even according to the terms of the governances, full-time faculty * * * members constitute * * * something less than a voting majority on about half of [the standing committees]. The proportion of faculty members who vote on the committees is further reduced in some cases by administrators voting on committees in contravention of the terms of the governances." Pet.

App. 25. "[E]ach administrative committee," moreover, "is chaired by a dean who sets the agenda and may prevent the committee from meeting, as the dean of the School of Architecture did for 4 years." As a result, the Board noted, "the record reflects an extremely limited role played by the administrative committees, when they are functioning, in personnel, financial, and other nonacademic matters" (Pet. App. 25).

The Board found further, based on a long history of administrative decisionmaking without faculty participation, that the faculty did not exercise significant authority in either academic or nonacademic matters. In 1972, without faculty participation, the administration implemented a major reorganization of the University, eliminating the previous department structure, consolidating the various departments into divisions, and appointing new division heads. The administration thereafter rejected a faculty recommendation that the division heads be appointed by the faculty. Again without faculty participation, the administration in 1972 created new degrees in mathematics and science. Pet. App. 15-16.

In 1973, the provost, whose job had been created and who had been selected without faculty participation (Pet. App. 16), issued a report recommending increases in class size, student-teacher ratio and teaching loads; severe limitations on grants of tenure; decreases in the number of full-time faculty; and increases in the proportion of adjunct faculty members to full-time faculty. While the student-faculty Senate was considering these proposals, the administration implemented them. When the faculty protested these unilateral changes, the provost suggested that the Senate "could be most useful by simply approving the proposals" (*ibid.*). Thereafter, relying on these new policies, petitioner's president began to reject many tenure recommendations--including cases where the candidate had received unanimous faculty support (*ibid.*).

The Board found that in 1975 the administration, again without faculty participation, announced additional restructuring of the University as well as the elimination of several academic programs. The division structure was abolished; the School of Art and Architecture was divided into two separate schools; and a new Faculty of Liberal Arts and Science ("LA&S") was established outside of the degree-granting schools. The members of the LA&S faculty, constituting nearly half of all faculty members, were thereby disfranchised, since they had no right to vote on any governance committee. Pet. App. 16. The trustees also eliminated the curricula leading to degrees in mathematics, physics and distributive science, and eliminated physical education as a regular part of the curriculum. As a result of these changes, a number of tenured faculty members were permanently laid off. On no occasion was the faculty consulted or informed in advance about any of these actions. Pet. App. 16-17.[1]

The Board found that two years later petitioner's president announced plans to enter into a library consortium with New York University and another university. Under this proposed arrangement, administrative and purchasing decisions for the libraries of all three schools would be made by an N.Y.U. administrator. The proposal elicited substantial faculty resistance. Nevertheless, during the summer recess, and before the faculty had had sufficient time to present its objections, petitioner entered into the consortium agreement. Pet. App. 17-18.

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[1]In 1975, after petitioner's president informed the faculty-student Senate that he was required neither to consult with it nor accept its advice, the Senate disbanded. It thereafter remained defunct for about three years until after the collective bargaining agreement was entered into. Pet. App. 17.

The Board found the faculty's lack of effective authority particularly striking in routine academic and nonacademic areas. The faculty's recommendations concerning teaching appointments and tenure decisions were routinely ignored. Faculty members had no role in granting sabbatical leaves. Faculty members had "virtually no role in the areas of budget and facilities. Major decisions to sell and renovate facilities and to relocate personnel and activities within them have been made without faculty input or over faculty opposition. Similarly, faculty office space is assigned by the administration." The faculty has had no role in the appointment, retention, or employment conditions of nonteaching staff. Pet. App. 21.

3. The court of appeals granted enforcement of the Board's order to bargain (Pet. App. 3). It found that there was "substantial evidence that the Cooper Union faculty did not exercise effective recommendation or control in academic or nonacademic areas, and that they are not managerial or supervisory employees" (Pet. App. 8). The court noted, first, that the Board's finding that faculty authority was "ineffective in core academic areas" was "amply supported by the record" (Pet. App. 7). There was, the court said, "extensive evidence of * * * broad administrative authority to implement changes over faculty opposition in core academic areas such as curriculum" (Pet. App. 8). It added, morever, that "in the nonacademic areas noted by the Court in *Yeshiva* the faculty was extremely weak" (Pet. App. 7).

ARGUMENT

The court of appeals, enforcing the decision of the Board, properly applied the principles established in *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), to the circumstances of this case. The court's decision is consistent with those of other circuits, and the circuits are not, as

petitioner claims, in any "disarray" (Pet. 7). Accordingly, review by this Court is unwarranted.

1. In *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 288 (1974), the Court defined managerial employees—who are not entitled to the benefits of collective bargaining under the Act—as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " In *Yeshiva*, the Court ruled that a university faculty falls within this definition if it "exercise[s] authority which in any other context unquestionably would be managerial" (444 U.S. at 686), even though, as is typical in the university context, authority is not arranged hierarchically but is shared between the administration and one or more faculties (*id.* at 680).

In *Yeshiva*, although it noted that "[u]niversity-wide policies [were] formulated by the central administration with the approval of the Board of Trustees", (444 U.S. at 675), the Court found that the faculty did exercise managerial authority (*id.* at 686):

> Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these.

The Court recognized, however, that "[t]here * * * may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial" (444 U.S. at 691 n.31). In the present case, the Board and the

court of appeals correctly decided that petitioner is such an institution. The Board's findings, amply supported by the evidence and affirmed by the court of appeals, demonstrate that petitioner's faculty lacked any effective voice in school affairs—either academic or nonacademic. In every area of university governance, petitioner's faculty was effectively disfranchised: hiring, curriculum, university structure, budget, tenure, scheduling, and admissions. The contrast with Yeshiva University—in which faculty and administration shared authority in virtually all areas—could not be more stark. The court of appeals took careful note of this Court's holding in *Yeshiva* but found that here there was "substantial evidence that the Cooper Union faculty did not exercise effective recommendation or control in academic or nonacademic areas" (Pet. App. 8) and the Board was therefore justified in reaching a different result. This decision does not warrant further consideration by this Court.[2]

A faculty may, of course, be "managerial" even if its authority over management matters is not formally defined in writing: some of the power exercised by the *Yeshiva* faculty was described by this Court as advisory and informal. (444 U.S. at 675-677). Equally clearly, a faculty does

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[2]Contrary to petitioner's suggestion (Pet. 9), the Second Circuit did *not* treat "collegiality" at Cooper Union "as evidence of a lack of managerial authority." Rather, the court regarded the presence of administrators on faculty committees, coupled with the virtually unfettered "power of deans to control the agenda and meeting times of many of the committees" (Pet. App. 6-7), as undermining even the limited apparent grant of power to the faculty. Nor is petitioner correct in chastising the court of appeals for considering in its analysis the absence of faculty control in nonacademic areas. The court's approach was entirely consistent with the analysis of this Court in *Yeshiva*. See 444 U.S. at 677 & n.6.

not become nonmanagerial merely by disagreeing with the university administration, or by losing many of the battles.[3] The Court squarely held in *Yeshiva* that the sharing of authority between administration and faculty—typical of the mature private university—does not make the faculty "employees" under the Act. 444 U.S. at 680, 688-689. The "controlling consideration" underlying the Court's decision in *Yeshiva* was that the faculty exercised substantial authority over the academic matters that are the core of university management in a typical university. (444 U.S. at 686). Neither by charter nor by tradition nor in practice did the petitioner's faculty exercise any such power.

2. Petitioner does not appear to dispute the findings underlying the Second Circuit's decision, which are in any event amply supported by the record evidence. Rather, relying on *Loretto Heights College* v. *NLRB*, 742 F.2d 1245 (10th Cir. 1984), and *NLRB* v. *Lewis University*, 765 F.2d 616 (7th Cir. 1985), petitioner contends (Pet. 7) that certiorari is warranted because the circuits are in disarray as to the "type of control that renders a faculty managerial." There is no substance to that contention.

In *Loretto Heights*, the Tenth Circuit, enforcing an order of the Board, concluded that the faculty in that case did not have managerial status. It found that, as at Cooper Union, "the faculty's authority in most aspects of College governance is severely circumscribed" (742 F.2d at 1252). Thus, in academic areas the faculty's authority had been "severely diluted" (*id.* at 1254) by "the infrequent or insignificant

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[3]It would be especially inappropriate to base the decision whether or not a faculty is "managerial" on whether it has recently won or lost major disputes with the administration. The Board's recital of petitioner's long history of disregarding faculty views demonstrated not that the tide had been running against the faculty, but, rather, that the faculty had no significant role in the procedures by which decisions were made.

nature of some committee work, the mixed membership of many committees, the faculty's limited decision making authority, and the layers of administrative approval required for many decisions" (*ibid.*). Moreover, the court noted, "outside the academic sphere" the faculty "plays little if any role" (*id.* at 1252). Faculty members had "a very limited degree" of input into the budgetary process, and "play[ed] virtually no role in the admission, retention and expulsion of students from the College, the size of the student body, awarding honorary degrees, establishing tuition requirements, or making financial aid determinations" (*ibid.*). Finally, as the Tenth Circuit observed, Loretto Heights was structurally distinguishable from Yeshiva. The administration of Loretto Heights was "fairly large in relation to the size of the college" and had developed a " 'very effective buffer' " between top management and faculty. (*id.* at 1254). Because the college did not "need to rely extensively on the professional judgment of its faculty in determining and implementing academic policy (*ibid.*)—in sharp contrast to the structural needs of Yeshiva, (see 444 U.S. at 689)—the Loretto Heights faculty was not "aligned with management" for purposes of the National Labor Relations Act. (742 F.2d at 1254).

Applying the *Yeshiva* principles, the Seventh Circuit reached a different result on the facts in *NLRB* v. *Lewis University*, 765 F.2d 616 (1985). There, declining to enforce an order of the Board, the court found the Lewis faculty to be managerial. The factors considered by the court were precisely those analyzed by this Court in *Yeshiva*, by the Tenth Circuit in *Loretto Heights*, and by the Second Circuit in this case. Thus, surveying the structure and practice at Lewis, the court of appeals noted (765 F.2d at 628).

> [T]he full-time faculty of the College of Arts and Sciences at Lewis University have substantial authority, responsibility, and control of the formulation and

implementation of educational policies within the college. The full-time faculty, through their collective participation on faculty committees, as departmental chairpersons, and as members of the "faculty convened," determine student admission policies, graduation requirements, grading guidelines, curriculum changes, degree offerings, academic calendar matters, faculty tenure, faculty promotions, and faculty hirings within the college. Thus, the faculty governance structure within the College of Arts and Sciences is clearly distinguishable from the very limited faculty participation in the governance of Loretto Heights College.

The results in this case, in *Lewis*, and in *Loretto Heights* are attributable not to any misunderstanding of this Court's *Yeshiva* decision, nor to any conflict among the circuits over how that decision should be applied. Rather, each court, faced with an individual set of facts, analyzed the structure and practice within the particular school in light of the standards established in *Yeshiva*. The Court's decision in *Yeshiva* contemplated that there would be such factual differences between different colleges, (see 444 U.S. at 690 n. 31); that this prediction has proved correct does not warrant review of fact-bound decisions, like the present one, that are entirely faithful to the principles of *Yeshiva*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]The Solicitor General is disqualified in this case.